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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

ARTURO BOYER et al.,

Plaintiffs and Appellants,

v.

DAVID FRISCIA et al.,

Defendants and Respondents.

E047694

(Super.Ct.No. INC064184)

OPINION

APPEAL from the Superior Court of Riverside County. James A. Cox, Judge.

Affirmed.

Arturo Boyer, in pro. per., for Plaintiff and Appellant.

Susan Boyer, in pro. per., for Plaintiff and Appellant.

Davis, Grass, Goldstein, Housouer & Finlay and Stacy K. Brigham for  
Defendant and Respondent David Friscia, M.D.

Kramer, Deboer, Endelicato & Keane, Deborah Olsen deBoer, Erik S.

Laakkonen and Kathleen A. Stosuy for Defendant and Respondent Michael S. Somero,  
M.D.

Arturo and Susan Boyer (collectively, the Boyers)<sup>1</sup> sued David Friscia, M.D., and Michael Somero, M.D., for malpractice and loss of consortium. The trial court granted Friscia's and Somero's motions for summary judgment. (Code Civ. Proc., § 437c.)<sup>2</sup> The Boyers contend that the trial court erred by granting summary judgment because (1) the statutes of limitation had not expired; (2) Friscia's and Somero's motions for summary judgment were improperly formatted; (3) medical experts' opinions do not have probative value; (4) Friscia performed surgery on Arturo without Arturo's informed consent; (5) the trial court relied on Friscia's and Somero's assertions that the Boyers did not present a triable issue of fact; and (6) Friscia deliberately tried to conceal the Boyers' causes of action by misrepresenting the nature of Arturo's surgeries. We affirm the judgment.

### **FACTUAL AND PROCEDURAL HISTORY**

In January 2003, Arturo fell from a ladder and fractured his heel. After the fracture healed, Friscia began treating Arturo's heel for arthritis and an incongruent joint. On July 8, 2003, Friscia operated on Arturo's heel. Friscia placed a screw into the bones of Arturo's heel. Arturo suffered an infection at the surgery site. Friscia performed a second surgery on Arturo's heel on September 21, 2004, in order to reduce the swelling and infection. Friscia performed a third operation on Arturo on April 26,

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<sup>1</sup> For ease of reference, and with no disrespect, Arturo and Susan Boyer, individually, will be referred to by their first names.

<sup>2</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

2005, because Arturo was still suffering from an infection. During the third surgery, Friscia removed the screw and took cultures from the screw tract and surrounding tissues.

Friscia referred Arturo to Somero, an infectious disease specialist. On April 28, 2005, Somero began treating Arturo's postoperative infection. Somero discovered that Arturo was suffering from an infection in the bones of his foot. Somero prescribed Arturo intravenous antibiotics.

On August 12, 2005, Arturo saw Friscia for a follow-up appointment. Arturo's infection was healing and the surgery site was stable. During the appointment, Arturo told Friscia that the hospital's insurance should reimburse Arturo for lost wages due to the infection. Arturo also told Friscia that his wife would retain an attorney if the hospital did not pay the Boyers for their losses. Friscia felt that Arturo was threatening him, and ended the doctor-patient relationship.

On November 25, 2005, while the Boyers were in the Los Angeles area, Arturo began to experience pain in his foot. Arturo went to UCLA Medical Center's emergency room. Dr. Park evaluated Arturo, and diagnosed him as possibly suffering from a bone infection, as a result of the multiple surgeries.

In the Boyer's second amended complaint, they asserted that, between November 25 and 27, 2005, they discovered that the postoperative medications prescribed to Arturo may have been inappropriate or ineffective. Also in their second amended complaint, the Boyers alleged that they notified Friscia and Somero of their intent to sue on August 29, 2006. The Boyers filed their original complaint on January 5, 2007.

The trial court granted the motions for summary judgment based upon its findings that the Boyers' original complaint was not filed within the time allotted by the statutes of limitations.

## **DISCUSSION**

### **A.     STATUTES OF LIMITATIONS**

The Boyers contend that the trial court erred by granting the summary judgment motions because the statutes of limitations had not expired. We disagree.

“““A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff ‘has not established, and cannot reasonably expect to establish,’” the elements of his or her cause of action. [Citation.]’ [Citation.] We review the trial court’s decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party. [Citation.]” (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

#### **1.     MALPRACTICE**

We begin by analyzing Arturo’s claim for malpractice. The statute of limitations for filing an action against a health care provider, based upon the provider’s alleged professional negligence, begins “three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.” (§ 340.5.)

On August 12, 2005, Arturo saw Friscia for a follow-up appointment. During the appointment, Arturo told Friscia that the hospital's insurance should reimburse Arturo for lost wages due to the infection. Arturo also told Friscia that his wife would retain an attorney if the hospital did not pay the Boyers for their losses. At this point, Arturo was discussing retaining an attorney; therefore, the Boyers suspected that the doctors had been negligent. Consequently, through the use of reasonable diligence the Boyers should have discovered that Arturo was possibly suffering from an injury caused by malpractice. Based upon this evidence, the one-year statute of limitations began running in August 2005. Therefore, Arturo had until August 2006 to file his complaint for malpractice. The Boyers filed their original complaint on January 5, 2007, which was beyond the statute of limitations. Accordingly, the trial court did not err by granting the summary judgment motions in regard to Arturo's claim for malpractice.

The Boyers assert that Friscia intentionally concealed Arturo's malpractice cause of action by misrepresenting the nature of Arturo's surgeries; and therefore, the statute of limitations was tolled. The statute of limitations may be tolled if a defendant has intentionally concealed a plaintiff's cause of action. (§ 340.5.) The statute of limitations began to run when Arturo asserted that the hospital was liable for his infection; therefore, Friscia's alleged concealment would not have affected the deadline for filing the complaint, because the time started to run when the Boyers became aware of, or reasonably should have discovered, the alleged malpractice.

Next, with no citation to the record, the Boyers assert that the statute of limitations was tolled due to a notice of intent to sue that they allegedly sent to Friscia

and Somero on August 29, 2006. Before initiating a malpractice action, a plaintiff must give a defendant 90-days notice of his intent to sue. (§ 364, subd. (a).) “If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.” (§ 364, subd. (d).) Arturo spoke to Friscia about a possible lawsuit on August 12, 2005; therefore, the statute of limitations expired on August 12, 2006. The notice of intent to sue was allegedly sent on August 29, 2006, *after* the statute of limitations had expired. Accordingly, we are not persuaded that the statute of limitations was tolled.

We note that in the Boyers’ second amended complaint, they claim that they became aware of the alleged malpractice between November 25 and 27, 2005, while Arturo was at UCLA Medical Center. The second amended complaint is not verified, and the Boyers did not cite to any declarations or deposition transcripts to support their assertion. We have reviewed the medical report from UCLA Medical Center, which is included in the record. The UCLA doctor’s diagnosis of a possible bone infection is the same diagnosis given by Somero on April 28, 2005, and Friscia on April 26, 2005. Accordingly, we cannot infer from the evidence that the Boyers learned new information about Arturo’s condition while at UCLA that would have provided them with more insight into the alleged malpractice. In sum, we do not find support in the record for the Boyers’ claim that they first became aware of the possible malpractice in November 2005.

## 2. *LOSS OF CONSORTIUM*

Next, we analyze Susan Boyer's cause of action for loss of consortium. "The statute of limitations for loss of consortium is one year from the date of the spouse's injury, and there is no tolling during the pendency of the spouse's personal injury action. [Citation.]" (*Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1034; see also *Priola v. Paulino* (1977) 72 Cal.App.3d 380, 387, fn. 4 [one year statute of limitations].) Arturo began suffering from an infection following the surgery on July 8, 2003. Accordingly, the statute of limitations on Susan's claim began to run in the summer of 2003, and expired in the summer of 2004. The Boyers filed their original complaint on January 5, 2007. On January 5, 2007, Susan's cause of action had been expired for approximately two years, and therefore, the trial court did not err by granting the summary judgment motion.

### B. REMAINING CONTENTIONS

We do not address the Boyers' remaining contentions, such as improper formatting and informed consent, because we have concluded *ante*, that the trial court did not err by granting the motions for summary judgment. (See *Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1253 [not addressing remaining contentions].)

**DISPOSITION**

The judgment is affirmed. Parties are to bear their own costs on appeal.

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/s/ MILLER

J.

We concur:

/s/ RAMIREZ

P. J.

/s/ HOLLENHORST

J.